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DECISION AND ORDER

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE R.S.O. 1980, CHAPTER 340.

AND IN THE MATTER of the complaints made by Bahjat Tabar of Scarborough, Ontario, and by Chong Man Lee and Kyung S. Lee, both of Toronto, Ontario, that West End Construction Limited of 625 Evans Ave., Toronto, and David Scott, Vice-President of West End Construction Limited, discriminated against each one of them and a class of persons because of race, nationality, ancestry, and/or place of origin, in contravention of paragraphs 3(1)(1) and/or(b) of the Ontario Human Rights Code, R.S.O. 1980, c. 340.

BOARD OF INQUIRY

Professor Peter A. Cumming, Q.C.

Appearances:

Ms. Janet E. Minor	Counsel for the Ontario Human Rights Commission and the complainants, Bahjat Tabar, Chong Man Lee and Kyung S. Lee.
Mr. John Richardson, Esq.	Counsel for the Respondents, West End Construction Limited and David Scott

The Evidence.

This Board of Inquiry is the subject of three Complaints, one by Bahjat Tabar, one by Chong Man Lee, and another by the latter's spouse, Kyung S. Lee, all of Toronto. The last mentioned Complainant, Kyung S. Lee, was made a party to the hearing as a Complainant near the end thereof, for reasons given hereafter. Kyung S. Lee is the spouse of Chong Man Lee, and their interests are identical.

At the commencement of the hearing, counsel for the Respondents made motions to dimiss the Complaints of Mr. Tabar and Mr. Lee on several bases (Exhibit # 3). I have already dealt with these motions, dismissing them with reasons given in an Interim Decision of August 13, 1982: see Tabar and Lee v. West End and Scott, (1982) 3 C.H.R.R. D/1073.

The corporate Respondent, West End Construction Limited (hereafter "West End") is located in Toronto and the individual Respondent, David Scott, age 32 in 1984 is the Vice-President of the corporate Respondent. The corporate Respondent owns and manages an apartment building complex at 53 Widdicombe Hill Blvd., in Etobicoke. The apartment complex consists of two apartment buildings, being 53 and 57 Widdicombe Hill Blvd., which are connected by a tunnel, and each of which have 139 suites. From all the evidence, it is clear they are luxury apartments with a number of older, retired and well-to-do tenants.

Mr. Bahjat Tabar is a Catholic Arab from Israel, originally a carpenter whose father had a grocery store in Nazareth, who immigrated to Canada in May, 1968, residing in Toronto. At first he opened a restaurant, then later operated, one at a time, small jug milk or variety stores as a franchisee.

About December, 1975, wanting to be in business on his own as a proprietor rather than as a franchisee, Mr. Tabar learned that there was to be a 'tuck shop' jug milk type of store in the basement floor of the apartment complex owned by the Respondent West End at 53 Widdicombe Hill Blvd. (hereafter "Widdicombe"), in Etobicoke. The store is intended to service the tenants, and their guests, of the apartment complex. At that point in time the apartment complex was owned in partnership together as "Widdicombe Hill Developments" (see Exhibit # 23) by West End and another corporation, Labmec Ltd., but they were in dispute with each other with the result that the apartment complex was placed in temporary receivership, and Mr. Tabar entered into negotiations and he and his son concluded a lease with the receiver, Coopers and Lybrand. The corporate Respondent, West End, then purchased its partner's interest. As such, West End became

the owner and manager of the apartment complex before Mr. Tabar got the tuck shop into operation in early 1976. The business is a modest one, but demanding of the proprietor for it must be open at least, some eighty-six hours a week.

The lease (Exhibit # 23) provides:

> THE LESSEE shall use the premises for the retail sale of milk groceries, magazines, household supplies and other items usually offered for sale in a tuck shop and may also carry on the business of a dry-cleaning pick-up and delivery centre. The Lessee covenants not to offer for sale products or services which the Lessor considers objectionable, and further covenants to offer for sale products and services which the Lessor may reasonably consider necessary for a tuck shop operation in a luxury apartment building. If a dispute arises between the Lessor and Lessee as to what products or services the Lessor considers should be offered for sale or what products or services offered for sale but considered objectionable by the Lessor, the matter shall be submitted to arbitration in the manner set out herein.
>
> The Lessee agrees to keep the premises open for business during such hours and on such days as the Lessor and Lessee may reasonably consider necessary for the convenience of the tenants in the building. The minimum hours shall be from 10:00 a.m. to 10:00 p.m. on Sunday to Thursday and 10:00 a.m. to 11:00 p.m. on Friday and Saturday. Should the Lessee wish to be open earlier than 8:00 a.m. or later than 11:00 p.m. he must obtain permission from the Lessor.

Shortly thereafter Mr. Tabar felt that his health was deteriorating, and he found the lack of fresh air in the basement particularly debilitating, so a month or two later decided to sell his tuck shop business. To effectively do so, he had to be able to assign his interest as leasee in the premises, and to do this he required the consent of the landlord.

The lease (Exhibit # 23) contains a clause allowing the landlord to refuse arbitrarily an assignment or sub-let.

> AND the said Lessee covenants with the said Lessor to pay rent; and to repair, reasonble wear and tear and damage by fire, lightning and tempest only excepted; and that the said Lessor may enter and view state of repair, tear and damage by fire, lightning and tempest only excepted; and will not assign or sub-let without leave, and such leave may, notwithstanding any statutory enactment to the contrary, be arbitrarily refused by the Lessor in his sole and uncontrolled discretion.

It was at this point that Mr. Tabar encountered the difficulty of assigning his lease, and claims that West End, through its corporate officer, the individual Respondent, David Scott, discriminated against prospective purchasers on grounds prohibited by the Ontario Human Rights Code, R.S.O. 1980, c. 340 (hereafter "the Code") and discriminated against him also, contrary to paragraphs 3(1)(a) and/or (b) thereof. These provisions read:

> "3.-(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
>
> (a) deny to any person or class of persons occupancy of any commercial unit or any housing accommodation; or
>
> (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any housing accommodation,
>
> because of race, ..., colour, ..., nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons."

It is certain from the evidence that West End at all times had the authority to make all management decisions in respect of the apartment complex, including the matter of assignment of the lease (Exhibit # 23) in respect of the tuck shop, and that the individual Respondent, David Scott, who was at all times part of the management of West End, had the authority of West End to make all such decisions on behalf of the corporation. Accordingly, if the individual Respondent David Scott is in breach of the Code in respect of any one or more of the Complaints before this Board, then the corporate Respondent West End is also in breach of the Code. See Olarte et al v. Commodore Business Machines Ltd. (1983) 4 C.H.R.R. D/1705 at D/1737 - D/1747 (Ont. - Cumming). The act of an officer or employee who is part of the directing mind of the corporation, done during the course of his employment, will be deemed to be an act of the employer corporation.

Specifically, Mr. Tabar claims that the Respondents discriminated against prospective purchasers because of their race, colour, nationality, ancestry and/or place of origin. Mr. Tabar had successive offers to purchase his business from Mr. Shabudin A. Jivraj, then from Mr. Do Trong Chu, and then from Mr. S. Andani, but Mr. Scott refused to consent to an assignment of the lease to any of these individuals. Mr. Scott denied that his, or West End's intent, was to discriminate unlawfully against anyone at any time.

Mr. Scott emphasized in his evidence that West End wanted a particular type of person to have the tuck shop business. The tuck shop was not simply to be an ordinary convenience store, but was seen as an integral part of the apartment building complex, being a service to the residential tenants and their guests. Mr. Scott said that, accordingly, West End wanted to have a great deal of control over any change in respect of the operation of the tuck shop. He said that West End had had a bad experience in 1974 in another apartment building where a tuck shop operator sold to someone shortly after the business was started, who did not work out. With that in mind, Mr. Scott claimed that the stringent clause in respect of assignments was included within the lease (Exhibit # 23), and Mr. Tabar and his son were chosen as tenants.

Mr. Tabar eventually was successful in the fall of 1976 in selling his business, and assigning his lease, to a Mr. Tong Sung Khang, a man of Korean origin, pursuant to an Offer of Purchase (Exhibit # 16) dated October 28, 1976. Mr. Tabar says he was able to do so "only because I agreed to pay the sum of $5,000 to West End Construction." (Complaint, Exhibits # 21 and #6).

As mentioned, Mr. Tabar had had an earlier Offer from a Mr. Shabudin A. Jivraj, a man born in India, dated April 28, 1976 (Exhibit #7) for the sum of $27,000.00. The documents in connection with the abortive Jivraj purchase were filed as exhibits # 7 to # 13 inclusive. The eventual Khang sale was for the gross price of $18,000.00, from which West End, through Mr. Scott, exacted $5,000.00 as a condition precedent to assigning the lease.

Mr. Jivraj's offer was subject to the condition (#9 on page 2 of Exhibit # 7) of his confirming the vendor's statement as to sales volume. Mr. Jivraj's wife worked in the shop for a few days, confirmed the sales' volume to the intended purchaser's satisfaction (the condition was formally deleted May 3, 1976 - see attached "Amendment" to Exhibit # 7) and the intended purchaser indicated to Mr. Tabar that he wanted to complete the transaction. Mr. Tabar was certain Mr. Scott had seen Mrs. Jivraj in the shop over this time, and that Mr. Scott acknowledged this to him although Mr. Scott testified he could not remember. (Transcript Vol. I, p. 79; Vol. VI, p. 69). Mr. Tabar testified that when he approached Mr. Scott about the Jivrajs offer, and Mr. Scott acknowledged that he had seen Mrs. Jivraj in the store, that Mr. Scott said "No, I don't want it. I don't want even to see her in the building." (Transcript, Vol. I, p. 160).

Mr. Tabar then advised his lawyer of the intended sale of the business, and Mr. Jivraj also went to his lawyer (Exhibit # 8). Mr. Tabar then attended at Mr. Scott's office, gave him a copy of the Offer and asked him to consent to the assignment of the

lease, but says Mr. Scott refused, saying he did not want the Jivrajs because they are "coloured" and that he wanted "just white or European people" in the building. (Transcript, Vol. I, p. 79). Mr. Tabar testified that Mr. Scott did not ask any information about the finances of the Jivrajs, nor did he give any reason for his not wanting them as tenants other than that "I don't put his kind of people in my building." (Transcript, Vol. I, pp. 79, 80). Mr. Tabar advised his lawyer, and also went to see Mr. Alexander Wandich, Mr. Scott's superior, and father-in-law, in West End Construction Limited who, Mr. Tabar testified, simply told him that he would have to deal with Mr. Scott. (Transcript, Vol. I, p. 80). The correspondence between Mr. Tabar and his lawyer, and the lawyer and the vendor's real estate agent (Exhibits # 9 to #13 inclusive) confirm that the transaction was aborted simply because of the refusal of Mr. Scott to consent to the assignment of the lease.

In his testimony, Mr. Scott recalled Mr. Tabar saying he had an offer from Mr. Jivraj, but West End "did not want to even contemplate a sale of the tuck shop" as the Tabars had only been operating the business for a short time and accordingly he was not "about to consider the ability of the prospective purchaser to operate the store." (Transcript, Vol. VI, p. 48). He testified he did not ask about the background of the Jivrajs because West End was not interested in assigning (Transcript, Vol. VI, p. 76). Asked as to whether Mr. Tabar made any accusations about discrimination, Mr. Scott said "I don't remember that" and "I don't believe there was any suggestion as to that." (Transcript, Vol. VI, pp. 49, 50).

Mr. Scott acknowledged that Mr. Tabar had begun to complain in March or April, 1976, about his health and to complain that he was not getting enough fresh air in the store, and that the store was not sufficiently air conditioned. (Transcript, Vol. VI, pp. 45, 50, 51-53). Mr. Tabar installed, at his own expense (Exhibit # 28) additional air conditioning capacity in the store. This tended to confirm the sincerity of his complaints with respect to problems with the air in the basement. However, this air conditioning unit was necessarily affixed to the garage wall, so that, as Mr. Scott agreed, the air entering through the unit might have some fumes. (Transcript, Vol. VII, pp. 84, 85). Mr. Tabar testified that at one point in 1976 he was confined to hospital because of a heart attack, to Mr. Scott's knowledge. (Transcript, Vol. III, p. 132).

Even though Mr. Scott acknowledged that Mr. Tabar was often complaining about his health problems, Mr. Scott emphasized that West End "didn't have any proof as to the state of his health." (Transcript, Vol. VI, p. 50). When it was suggested on cross-examination that Mr. Tabar was complaining, and that he was not happy, Mr. Scott's

response was only that Mr. Tabar "was appearing to be unhappy." (Transcript, Vol. VI, p. 63). Throughout his cross-examination, when asked about Mr. Tabar's continuing complaints about his health, Mr. Scott would only reply that he did not have personal knowledge as to whether Mr. Tabar was sick or not. Mr. Scott also emphasized that Mr. Tabar's son was also a tenant and could have carried on, but it is clear from all the evidence that Mr. Tabar's son had only a very nominal role in the business.

Mr. Scott asserted that his motive was to keep the Tabars as tenants, as they were managing the tuck shop business satisfactorily. However, it was very apparent to him that Mr. Tabar was very unhappy in continuing to stay at 53 Widdicombe Hill Blvd., so that one would think Mr. Scott at least would contemplate that West End might provide better service to its residential tenants through a happy, satisfied tuck shop operator rather than an unhappy, dissatisfied operator. Mr. Scott said that West End was not prepared to allow any assignment of the lease at that point in time, given that West End's main objective was to have a long term tenant. However, an unhappy, continuing tenant could easily be worse from West End's standpoint than having a new, happy tenant operating the tuck shop.

Mr. Scott asserted that West End was also concerned about a quick turnover of the tuck shop business, but ignored the fact that a purchaser prepared to pay a good price for the business would presumably be committed to making the business a success. His stated concern also was that his residential tenants might have reservations about a quick turnover in the business. However, this perceived problem, if such there was, could have been handled easily by a satisfactory purchaser coupled with a communication to all the tenants explaining that Mr. Tabar had left for reasons of health.

Mr. Tabar's real estate agent, Mr. H. Juma, then found a prospective purchaser, Mr. Do Trong Chu, a Vietnamese, who submitted an Offer to Purchase from him and his spouse dated September 2, 1976, (Exhibit # 14), for $25,000.00. Mr. Tabar then advised Mr. Scott of the intended purchase by the Do Trong Chus. Mr. Tabar testified that Mr. Scott requested that the intended purchaser, Mr. Chu, come to his office. (Transcript, Vol. I, pp. 85, 86). Mr. Tabar understood Mr. Chu to be a well-educated former diplomat of Viet Nam. (Attached to Exhibit # 14 is Mr. Chu's business card which names him as a "Counsellor of Embassy" of the Republic of Vietnam in Bangkok, Thailand). Mr. Chu's resume (later filed as Exhibit # 77) confirms this. When Mr. Chu returned Mr. Tabar testified that Mr. Chu said "Mr. Scott he don't want him." (Transcript, Vol. I. p. 86). Mr. Tabar later confronted Mr. Scott about his refusal to accept Mr. Chu, and says Mr. Scott told him "I want people what I like." Mr. Tabar inferred Mr. Scott's statements to mean,

based on his earlier discussions with Mr. Scott, that Mr. Scott wanted only "white people, European people." (Transcript, Vol. I, pp. 86, 87).

In his testimony, Mr. Scott asserted that the language chosen in communicating to Mr. Tabar his refusal to consent to an assignment of the lease to Mr. Chu may have caused a misunderstanding on the part of Mr. Tabar, but that Mr. Scott had no intent to unlawfully discriminate. (Transcript, Vol. VI, pp. 57, 58).

Mr. Scott testified that he was prepared to talk to Mr. Chu, because of Mr. Tabar's continuing protestations about his deteriorating health, but that Mr. Chu's "limited experience in his business was one of the factors in our decision not to assign the lease." (Transcript, Vol. VI, pp. 55, 56).

It is to be noted that Mr. Scott would not meet with Mr. Jivraj, of East Indian origin, but was prepared to at least meet with Mr. Chu, a Vietnamese. When asked on cross-examination what had changed his mind by this point in time, so that he would at least interview a prospective purchaser of Mr. Tabar's business, after a very long pause, Mr. Scott said only that West End "thought it would be in our best interests and his best interests", and "if Mr. Tabar was sick" it was "not an inappropriate response" to allow an assignment. (Transcript, Vol. VII, p. 89).

Mr. Tabar then received an Offer to Purchase (Exhibit # 15) dated October 12, 1976 for $17,000.00 from an "S. ANDANI or his nominee". This intended purchaser was also refused by Mr. Scott. Mr. Andani was not identified precisely (and he did not testify) but seems to be of East Indian racial origin (Transcript, Vol. I, pp. 90, 91).

Mr. Scott asserted that he was still reluctant to allow any transfer, and that he was particularly concerned about an offer that allowed a sale to an unknown "nominee" (the Offer - Exhibit # 15 reading "or his nominee"), but he showed no apparent interest in determining whether there was a nominee in fact, or if so, who it was. (Transcript, Vol. VI, pp. 59, 60). A month before he had been prepared to at least meet with Mr. Chu as a prospective purchaser.

In cross-examination, Mr. Scott could only say he did not "recollect why we never met", and said he could not remember why he did not even invite Mr. Andani in for a discussion. (Transcript, Vol. VII, pp. 98, 99).

On October 28, 1976, Mr. Tabar received an Offer to Purchase (Exhibit # 16) for $18,000.00 from TONG SUNG KHANG & HIS NOMINEE". Mr. Tabar went to see Mr. Scott testifying that "I explained to him and I told him this is a Korean guy, he look like white..." (Transcript, Vol. I, p. 94). Mr. Scott agreed to the assignment, subject to

receiving $5,000.00 as consideration for giving the consent which, Mr. Tabar says, was at first demanded in cash, (Transcript, Vol. I, pp. 94, 95) but that after a discussion with Mr. Tabar's solicitor, this $5,000.00 was paid by cheque. (See Exhibit # 19 - Statement of Receipts and Disbursements, and Exhibit # 20 - the solicitor's reporting letter of November 18, 1976).

The Landlord's consent to the assignment (Exhibit # 18) included the provision:

> WE, WEST END CONSTRUCTION LIMITED, the duly authorized agent for the Landlord ... hereby consent to the within Assignment of (sic) Dong Sung Khang and Yong Soon Khang, as written, and save as aforesaid the covenant in the Lease against assignment and subletting shall remain in full force and effected. (sic).

Mr. Scott asserted that the reason he was amenable to consent to an assignment in respect of the Khangs' offer (dated only sixteen days later than the Andani offer) was because the Khangs had been operating a tuck store already, and therefore had prior experience, and Mr. Tabar was continuing to complain about deteriorating health. (Transcript, Vol. VI, pp. 61, 62). However, Mr. Tabar's own testimony suggested that Mr. Scott was prepared to consent to the assignment before seeing Mr. Khang, provided the $5,000.00 assignment fee was paid. (Transcript, Vol. I, p. 94). Moreover, the reason Mr. Scott knew nothing about Mr. Andani's prior experience, or his nominee's prior experience if there was in fact to be a nominee by Mr. Andani, was simply because Mr. Scott was not prepared to even consider Mr. Andani as a prospective tenant.

The solicitor for West End, Richard James Hazzard, testified in respect of the transfer fee. He stated that the management of West End felt that Mr. Tabar was profiting from the goodwill created by the landlord, through the location. (Transcript, Vol. VIII, po. 8, 9). Whether or not the transfer fee was exorbitant, it was within the legal rights of the landord to demand it. Mr. Hazzard also asserted that the solicitor for the Tabars had asked for a general release and implied that this was worth a significant amount of monitary consideration to the Tabars. (Transcript, Vol. VIII, p. 9). Mr. Scott in his own testimony attempted to make much of the assertion that the Tabars (through their solicitor) had requested a general release and that this was a significant, valuable consideration for the $5,000.00 assignment fee, as though the release justified the high dollar figure. (Transcript, Vol. VI, pp. 62, 63). These assertions were mere attempted rationalizations after-the-fact, in an attempt to justify the very large, extraordinary assignment fee. Undoubtedly it was the Tabars solicitor, Stanley Rosenfarb who wanted a general release, but undoubtedly this was an afterthought, as he testified, requested

because the landlord was demanding $5,000.00 as an assignment fee. (Transcript, Vol. VII, p. 8). It was also problematical that the landlord would be able, from a practical standpoint, to be able to collect from the Tabars, if the assignees defaulted and no release had been given.

Mr. Rosenfarb testified that Mr. Tabar had advised him at the time that West End had refused to consent to prospective purchasers who were "East Indian, Pakistani." (Transcript, Vol. X, p. 11). This evidence confirms that Mr. Tabar was alleging unlawful discrimination on the part of the Respondents long before the Complaint was filed, and long before he ever considered filing a Complaint. (Transcript, Vol. I, p. 100).

Mr. H. Juma, then a real estate salesman with Royalton Realty Corporation, testified. Mr. Juma is of East Indian ancestry, from Tanzania. Mr. Juma introduced Mr. Shabudin Jivraj as a prospective purchaser to Mr. Tabar. Mr. Juma knew Mr. Jivraj from their church and knew that he had operated a tuck shop type of business in Africa. (Transcript, Vol. II, p. 47). Mr. Juma confirmed Mr. Tabar's testimony in every respect. In particular, while Mr. Juma had no direct contact with Mr. Scott, he testified that at the time of the abortive sale Mr. Tabar told him that Mr. Scott had not approved the assignment of lease because of Mr. Jivraj's colour, and that Mr. Scott wanted "white people". (Transcript, Vol. II, pp. 49, 50).

Mr. Shabudin A. Jivraj testified. He is a dark skinned Muslim from India who lived in Nairobi, Kenya for some twenty-five years working in clothing and grocery stores, coming to Canada in 1975. He said he was employed for six months after his arrival, but suffered two lay-offs, so decided to go into his own business, making the offer to Mr. Tabar (Exhibit # 7) which business he intended to run himself, together with his wife. (Transcript, Vol. II, p. 65). His brother-in-law, who was in the same kind of business, advised him on the price of $27,000.00. Mr. Jivraj's wife worked in Mr. Tabar's store for some three days to confirm the sales volume and they then decided to proceed with the purhase. (Transcript, Vol. II, p. 67).

Mr. Jivraj impressed me as an enterprising, articulate, pleasant person who would have been a successful operator of Mr. Tabar's tuck shop business. This would be apparent to anyone who was prepared to assess him on the merits. When the deal did not go through, Mr. Jivraj bought another similar type store, which he later sold, and then bought another tuck shop business in an apartment building which he was operating successfully as of the time of his testimony. (Transcript, Vol. II, p. 69). Indeed, Mr. Scott conceded in cross-examination, given after Mr. Jivraj's testimony, that Mr. Jivraj seemed to be a suitable prospective operator of the tuck shop business. (Transcript, Vol.

VII, p. 71). He had dismissed Mr. Jivraj without any consideration on the merits, when Mr. Tabar had wanted to sell the business to him in May, 1976.

Credibility was, of course, very much in issue in this hearing. Mr. Tabar impressed me as a truthful witness and I accept his testimony. I observed Mr. Scott carefully on the witness stand, and it was quite apparent that he was not being truthful in his evidence. Where there is a conflict in the evidence of Mr. Scott and Mr. Tabar, I accept the evidence of Mr. Tabar and reject that of Mr. Scott. I also accept the evidence of Mr. Juma, Mr. Jivraj and Mr. Rosenfarb, all of whose evidence supported that given by Mr. Tabar. On the essential issue as to why Mr. Scott and West End were not prepared to consider the Jivrajs and Mr. Andani as prospective operators and tenants of the tuck shop, I have no doubt in finding on the evidence that Mr. Scott and West End did not want East Indians as owner/operators of the tuck shop business, and this was the sole reason why the Jivrajs and Mr. Andani were not considered. They were rejected out of hand by Mr. Scott because of their race, colour, ancestry and place of origin. Mr. Scott is a bright, articulate individual who asserted several rationalizations for his questioned motives and actions throughout his evidence, but I have no doubt in finding that he intentionally rejected any consideration on the merits of the Jivrajs and Mr. Andani simply because of their race, colour, ancestry and place of origin.

The Khangs operated the tuck shop business from about November 15, 1976 to September 14, 1977. They apparently decided that they wished to sell in early 1977. The Khangs received one Offer of Purchase (Exhibit # 55) dated February 23, 1977, but this Offer was not acted upon.

The Complainants, Chong Man Lee, and his spouse, Kyung S. Lee, both testified. Both are from Korea, coming independently to Canada in 1969, and then meeting each other and marrying in this country.

Mr. Lee testified that he arrived in Canada with only $20.00 in his pocket. He has been employed steadily since his arrival, as a business machine technician working for a number of companies. Mr. Lee also went to night classes at Ryerson Polytechnical Institute for some time after coming to Canada. It is quite obvious that both Mr. and Mrs. Lee are dedicated, reliable, conscientious workers. His wife worked as a Becker's franchisee in 1974-75, but then sold the business with the birth of children.

In 1977, the Lees decided that Mrs. Lee could again run a small store and knowing the Khangs, who at this time were operating the tuck shop business at 53 Widdicombe Hill Blvd., offered in July, 1977 (Exhibit # 29) to buy the business for $17,000.00. The sale was completed in early August, 1977, (Exhibit # 30). Mr. and Mrs. Lee testified that

Mr. Scott did not interview either of them before this purchase was completed, and only introduced himself to them some weeks after they were operating the store. Mr. Scott, in cross-examination, said he believed he had met with Mr. Lee before the transaction, but was not certain. (Transcript, Vol. VII, pp. 156, 157). Mr. Walter Stanley Gonet, who acted for the Lees at the time of their purchase of the tuck shop business from the Khangs in 1977 and in their attempt to sell to Mr. Samji in 1979, testified that at the time of the purchase from Mr. Khang there was no inquiry from West End as to the Lees' business acumen.

Mr. Lee did learn from Mr. Khang that Mr. Scott had demanded of Mr. Khang some money before he would consent to an assignment of Mr. Khang's lease. Mr. Gonet, as solicitor for the Lees, testified that he had learned from speaking with Mr. Khang's solicitor that Mr. Scott had exacted a payment of $2,500.00 in cash from Mr. Khang in 1977 when Mr. Khang was vendor of the tuck shop and the Lees were purchasers. Mr. Gonet was positive that he was told a payment in cash had been made. (Transcript, Vol. III, pp. 111, 113, 114, 139). On May 23, 1979, Mr. Gonet wrote to Mr. Khang in Los Angeles (Exhibit # 47), as follows, but received no reply.

> I act on behalf of Mr. Lee who is attempting to sell the aforesaid business. We have experienced certain difficulties in the sale on the part of David Scott who is acting on behalf of the landlord.
>
> It has come to our attention that it was necessary for you to pay a premium to obtain the landlord's consent to the assignment of the lease. We have been informed that Mr. Scott refused the consent due to the racial extraction of the prospective purchasers.
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> Mr. Scott has informed my client that he did not wish any purchasers of the Indian or Pakistani extraction. If you have had the same experience, I would ask that you relate to the writer your experience in this regard together with the amount of money demanded by Mr. Scott for the assignment of lease.
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> Your earliest written reply would be greatly appreciated.

Ashoa K. Verma, a general accountant, testified. He is of East Indian ancestry. He came to Canada in 1972, and was the accountant for the Khangs while they operated the tuck shop business. He testified that when Mr. Khang wanted to sell the business he had told Mr. Verma quite often that the owner of Widdicombe did not want "Asians" as operators of the tuck shop, and that Mr. Khang said that offers to purchase from Asians had been turned down. (Transcript, Vol. V, pp. 45, 46). Mr. Verma also testified Mr. Khang had told him that in respect of the eventual sale to the Lees, Mr. Khang was asked to pay $10,000.00 as an assignment fee and paid $5,000.00 in cash. (Transcript, Vol. V, p. 47).

Mr. Scott testified that West End demanded and received of the Khangs only a $200.00 assignment fee and claimed support for this assertion because of an entry of only $200.00 in West End's bank deposit book (Exhibit # 56).

The Lees operated the business without problems from about mid-August, 1977 to early 1979. While it was operated primarily by Mrs. Lee, Mr. Lee worked as well, depending upon his shift work as a technician. Mrs. Lee had taken her infant twin daughters back to Korea in 1977 to be cared for by her parents, so that she could operate the tuck shop business. Her older daughter, of kindergarten age, attended kindergarten near the apartment complex and then stayed in the store with Mrs. Lee until they went home. The Lees obviously worked extremely hard, were successful, and were liked by the tenants. Evidence was given that when the Lees ran into difficulties with Mr. Scott that there were some efforts by tenants, including two meetings attended by their solicitor, Mr. Gonet, in an attempt to help them. (Transcript, Vol. III, p. 118).

In early 1979, the Lees decided that as they wanted their twins to return from Korea, and as Mrs. Lee's time would be taken up in looking after them, they would sell the tuck shop business.

Mr. Scott knew that Mrs. Lee was expecting her children to return from Korea, so that there would be some decrease in service, given the demand on Mrs. Lee's time, and also knew the Lees were very anxious about the situation, and admitted on cross-examination that accordingly it might have been a good idea at the time from his standpoint to have a new operator of the tuck shop. (Transcript, Vol. VII, pp. 196, 197).

An agent for the Lees, Mr. K. Jamal, obtained an Offer to Purchase (Exhibit # 31), in the amount of $22,800.00 from "NIZAR SAMJI AND/OR HIS NOMINEE", dated February 1, 1979. The evidence was that Mr. Samji wanted a Mr. Suleman to purchase, or at least operate, this business. It was made known to Mr. Scott quickly that either Mr.

Samji, or Mr. Suleman, wanted to buy the business, but the evidence was clear that Mr. Scott simply did not want, and would not consider, either Mr. Samji or Mr. Suleman as a purchaser. Both Mr. Samji and Mr. Suleman are of East Indian racial origin.

Mr. Lee took the Offer to Purchase (Exhibit # 31) which the Lees as vendors had accepted, to Mr. Scott, explaining why the Lees wanted to sell the business. The Offer was subject to certain conditions, including the following:

> The vendor agrees to provide a letter from the landlord, that the rent will remain $400.00 per month from March 1st 1979, in spite of $500.00 as mentioned in the lease.
>
> The vendor agrees to get an option to renew the lease, of 1 additional term of 5 years from the expiry date of the present lease i.e. March 1st, 1981.
>
> The vendor will get a written consent from the landlord to assign the lease in the purchaser's name and provide a letter from the landlord, that the lease is in good standing as at closing.

One contentious issue was the question of rent. The lease (Exhibit #23) provides:

> YIELDING AND PAYING therefor yearly and every year during the said term unto the said Lessor the following to be due and payable on the following days and times.
>
> $150.00 on the 1st day of March 1976
> $200.00 on the 1st day of April 1976
> $250.00 on the 1st day of May 1976,
>
> and on the 1st day of each and every month thereafter up to an including the 1st day of February 1977; $400.00 on the 1st day of March 1977, and on the 1st day of each and every month thereafter until February 28th, 1979 and $500.00 per month from March 1st, 1979, to April 30th, 1981.

Thus, the lease clearly provides for the rent to move from $400.00 to $500.00 per month, as of March 1, 1979.

Mr. Lee testified that in January, 1979, he had requested Mr. Scott to keep the rent at $400.00 per month, and that Mr. Scott had agreed to this. (Transcript, Vol. II, p. 88; Vol. III, pp. 14, 15, 39, 40). Mr. Lee said that Mr. Scott had agreed to send a confirming letter, but this was never received. It would be shortly thereafter that the Lees decided to sell, and that Mr. Scott became aware of this desire. Mr. Scott admitted that he had received, prior to the Samji offer, a request from Mr. Lee to keep the rent at

$400.00/month, but asserted he had made no commitment, other than to consider the request. (Transcript, Vol. VII, pp. 167-172, 212). Mr. Gonet testified that Mr. Lee was certain in his mind at the time that Mr. Scott had committed West End to keeping the rent at $400.00 per month. (Transcript, Vol. III, pp. 106, 125, 138). The many documents prepared pertinent to the abortive sale to Mr. Suleman were filed as exhibits (#40 - #46). Mr. Gonet testified that "everything seemed to be in order. It was just a matter of getting the consent of the landlord and... close the deal." (Transcript, Vol. III. p. 196). I have no doubt that Mr. Scott created in Mr. Lee's mind the clear impression that the rent would remain at $400.00 for Mr. and Mrs. Lee and that a verbal commitment was made by Mr. Scott in this regard.

It is to be noted that in the lease (Exhibit # 59) West End later executed with Mr. Manji, the rent provided for over the three year term from January 1, 1980 to December 31, 1982 was $400.00 a month. Moreover, Mr. Scott orally allowed the rent to fall in each of 1981, 1982 and 1983, and indeed, at the time of the hearing, Mr. Manji was not paying any rent at all. It seems Mr. Scott was well aware that $400.00 was more than a reasonable rent from the landlord's standpoint, at the time Mr. Lee requested him to keep the rent at $400.00 per month.

Mr. Jamal testified that when he initially went to see Mr. Scott with Mr. Lee about the Offer to Purchase, Mr. Scott indicated there would be no problem in obtaining a consent to the assignment of the lease. (Transcript, Vol. V, pp. 5, 14, 15). Mr. Jamal said, however, that when he later attended with Mr. Lee and Mr. Samji at a site in Mississauga to try to obtain the consent from Mr. Scott, that after Mr. Lee saw Mr. Scott he returned to the car saying he could not get the consent because Mr. Scott "doesn't want to give the store to an Indian guy". (Transcript, Vol. VII, pp. 6, 7). Mr. Jamal testified that he later tried unsuccessfully to approach Mr. Scott on several occasions. (Transcript, Vol. V, p. 9).

Thus, the landlord had agreed orally with Mr. Lee to waive the March 1, 1979 rent increase, which accounts for the reference in the later Offer to the rent remaining at $400.00 per month, however, the condition was stipulated that there would be a letter from the landlord to this effect. Mr. Scott asserted at the hearing that he would never have given this letter, and therefore the deal would consequently have fallen through, and therefore, it was argued that Mr. Lee did not suffer any loss through not being able to complete the purchase with Mr. Samji.

Perhaps the oral waiver of rent increase by Mr. Scott was enforceable by Mr. and Mrs. Lee and the purchase could have been completed subject to the resolution of the

matter. As well, Mr. Samji might well have agreed to removing the condition if the purchase price had been reduced by $2,400.00 which seems all that was at issue (24 months then remaining on the lease, at $100.00 per month). Moreover, this condition in the Offer was never asserted by Mr. Scott in his discussions with Mr. Lee about the assignment as a problem, and was only raised at the hearing because it offered Mr. Scott a means of defeating or reducing Mr. Lee's claim against him. It is clear from all the evidence that the sole reason why the Samji offer was not acceptable to Mr. Scott was that it came from a person of East Indian ancestry and racial origin, and such person was not acceptable to Mr. Scott as a purchaser. He was not prepared at that time to consent to an assignment of lease to such a person on any basis. Thus, the conditon in the Offer as to the rent remaining at $400.00 per month was irrelevant to the central issue of whether there was unlawful discrimination.

The same can be said of the second condition in the Offer to Purchase (Exhibit # 31) which reads:

> "The vendor agreed to get an option to renew the lease, of 1 additional term of 5 years from the expiry date of the present lease, i.e. March 1st, 1981."

Mr. Gonet, as solicitor for the Lees, testified that this provision was understood between vendor and purchaser to mean that there was a five year further term with the rent to be negotiated, and failing agreement on rent, the question of rent would be arbitrated. (Transcript, Vol III, pp. 124, 125). This provison would not have been one that would have caused West End any difficulty, if West End was otherwise prepared to consider an assignment of the lease. Mr. Lee testified that Mr. Scott had committed himself to Mr. Lee to give an option for a five year renewal. (Transcript, Vol. III, pp. 69, 70). Mr. Gonet also testified on this point to the effect that Mr. Lee at the time felt that he had a commitment from Mr. Scott to renew the lease.

This condition in the Offer was never an operative reason for Mr. Scott refusing to consent to an assignment. It is clear that the sole operative reason for the refusal was the fact that Mr. Samji and Mr. and Mrs. Suleman were of East Indian racial origin. The condition in respect of a renewal in the Offer was merely a convenient after-the-fact excuse for Mr. Scott whereby he could attempt to rationalize his refusal to consider or consent to the assignment and whereby he could attempt to disguise the racially motivated reason for such refusal. If the proposed purchasers had not been East Indian, the conditions in the Offer would not have constituted a problem in obtaining a consent to the assignment of the lease. Moreover, I accept Mr. Gonet's evidence that in his

preparation of the sale documents Mr. Lee was under the understanding that he had a commitment from Mr. Scott not to raise the rent and to give an option to renew.

Mr. Sadrudin Manji became the tenant after the Lees, occupying the premises as of about September, 1979. It is to be noted that the lease with Mr. Manji (Exhibit # 59) is for three years, from January 1, 1980 to December 31, 1982, at a rent of $400.00 per month. Moreover, Schedule "C" therefore provides for two options of renewal in favour of Mr. Manji. First, the lease may be extended to December 31, 1984 at a rent of $450.00 per month (although the overall sum is also stated as being $5000.00 annually), and second, the lease may be extended a further three years from January 1, 1985 to December 31, 1987 at a rent of $500.00 per month.

The conditions in the Offer were not a reason for the rejection of Mr. Samji, and Mr. Suleman, nor did Mr. Scott suggest so to Mr. Lee at the time. All the evidence (see, for example, Exhibit # 39 in which Mr. Samji checked the weekly sales and removed the condition in the Offer as to the vendor's warranty of sales volume) indicates that Mr. Samji was quite prepared, indeed anxious, to complete the transaction. (Transcript, Vol. V. p. 4). Mr. Jamal testified that Mr. Samji was a very good businessman, had made the deposit, and had the money to close the transaction. (Transcript, Vol. V, p. 8).

Mr. Scott simply would not honestly evaluate Mr. Samji's Offer on the merits once he knew that such prospective tenant was an East Indian.

Mr. Lee said he found it very difficult to meet with Mr. Scott after initially leaving the Offer with Mr. Scott, as Mr. Scott would not show up for appointments; nor would Mr. Scott meet with Mr. Samji. Throughout his dealings with Mr. Scott, Mr. Lee made notes (Exhibit # 33 and # 37), because Mr. Scott would not keep appointments and Mr. Lee thought Mr. Scott was lying to him. As the closing date, March 15, 1979 was approaching, the Lees were becoming increasingly concerned and worried.

From his own testimony, it is clear that Mr. Scott was being told about Mr. Samji. Indeed, Mr. Scott testified he feared Mr. Samji would be an absentee owner, using the tuck shop primarily to feed his dry cleaning business. (Transcript, Vol. VI, p. 83). But he learned, as was also clear from his own testimony, that in fact Mr. and Mrs. Suleman were to be Mr. Samji's nominees, and they would be the purchasers in fact. (Transcript, Vol. VI, pp. 86, 87).

Mr. Lee testified that in his conversation with Mr. Scott, Mr. Scott told Mr. Lee, referring to the intended purchaser, "I don't like these people" and when asked to be explicit, said "you know", and "I have experience with this kind of people." (Transcript,

Vol. VII, pp. 97, 98). When Mr. Lee went back the next day to press Mr. Scott, Mr. Scott raised concerns that Mr. Samji might be operating two businesses and that the "nominee" in the Offer was unknown. Mr. Lee returned with the information that the Sulemans were to be the nominees, and it seems this was reduced to a formal offer. (Transcript, Vol. II, p. 101). While the offer was not put into evidence, the draft sale documents were. (Exhibit # 46).

Mr. Lee testified that Mr. Scott said he would consider them, but when Mr. Lee called back three days later, said Mr. Scott again said "I don't like this kind of people" and testified that Mr. Scott suggested he bring in Korean people. Mr. Lee understood that Mr. Scott did not want East Indian or West Indian purchasers. (Transcript, Vol. II, pp. 101, 102).

Mr. Lee said that later that day he accused Mr. Scott of discrimination but Mr. Scott just repeated himself by saying "I don't like these people" (Transcript, Vol. II, p. 103) and walked away. In his testimony, Mr. Scott said that if he had used any such words, the reference was only in respect of the manner in which he felt the new purchaser might operate the tuck shop business. In his testimony, Mr. Scott allowed that he might have said to Mr. Lee that Mr. Lee's church might be the source of a purchaser from the Lees, as a mere suggestion. Mr. Lee testified that Mr. Scott made it clear to him that the purchaser was not acceptable because of racial origin and testified that Mr. Scott wanted Mr. Lee to bring another offer, from someone within the Korean community. I have no doubt in accepting Mr. Lee's evidence, and rejecting Mr. Scott's asserted denials of racial discrimination.

Mr. Scott was prepared to have a Korean tenant in the tuck shop, because the Lees, as well as the Khangs, had proven themselves. Mr. Scott had made it clear to Mr. Lee, just as he had previously to Mr. Tabar, that an East Indian purchaser was unacceptable. Mr. Lee tried to get Mr. Scott to see Mr. Samji and Mr. and Mrs. Suleman, but Mr. Scott made it as difficult as he could for the meeting to take place. When Mr. Lee, bringing with him Mr. Samji, Mr. and Mrs. Suleman, and the agent, Mr. K. Jamal, finally chased Mr. Scott down at a construction site, and had them waiting outside in a car, Mr. Scott refused to interview them. (Transcript, Vol. II, pp. 104-108). It was made obvious that Mr. Scott did not want to see the intended purchasers, and the group left. Mr. Scott refused to even consider Mr. Samji or the Sulemans, on their merits. Mr. Gonet, in his testimony, confirmed Mr. Lee's evidence on this point saying following the attempted meeting, Mr. Lee said that Mr. Scott had refused to meet with Mr. Samji and Mr. Suleman, and also that Mr. Scott had told Mr. Lee he preferred purchasers who were

members of Mr. Lee's church or a relative or friend. (Transcript, Vol. III, pp. 100, 107). Mr. Gonet called Mr. Wandich of West End about the problem, who told him to deal with Mr. Scott.

Mr. Gonet testified he then called Mr. Scott who said he didn't particularly care for the purchasers and that "Mr. Lee might be better off if he sold the store to a friend of his, or a relative, or somebody in his church" (Transcript, Vol. III, p. 108) Mr. Gonet appealed to Mr. Scott "on humanitarian grounds" saying that Mrs. Lee was very despondent because she had not seen her children for some years and this was the reason they wanted to sell the store. Mr. Scott replied that he would not consent to the assignment, told Mr. Gonet he took great pride in the unusual consent clause whereby it could be unreasonably and arbitrarily withheld, and that if and when there was any sale that there would be an assignment fee of $5,000.00, that being "his standard fee". (Transcript, Vol. III, pp. 109, 110).

The next morning, Mr. Lee telephoned Mr. Scott, and Mr. Scott again told him that he did not "like these kind of people", (Transcript, Vol. II, p. 108) but, under pressure from Mr. Lee, Mr. Scott said he wanted another two weeks to consider the matter. Mr. Lee testified that Mr. Scott had also told him at the construction site meeting the day before that even if there was an acceptable assignee, any assignment of the lease would be given only upon payment of a $5,000.00 fee.

Mr. K. Jamal, the real estate agent, testified that when Mr. Lee returned to the car after speaking with Mr. Scott, that Mr. Lee told him that Mr. Scott had demanded $5,000.00 for any assignment and also "doesn't want to give the store to an Indian guy" as purchaser. (Transcript, Vol. V. pp. 6, 7). Mr. Jamal's evidence tends to confirm Mr. Lee's testimony.

Nizar Suleman testified. He has been operating a tuck shop type of business in a high rise apartment since November, 1981. He had helped his father in a store in Tanzania before coming to Canada in July, 1975. His wife had also worked in a similar type business for her father in Uganda before coming to Canada. Mr. Suleman testified that he learned through Mr. Jamal and Mr. Samji that Mr. Samji was intending to buy the tuck shop business at Widdicombe. Desiring to purchase such a business for himself and his wife, he visited the site, and offered through Mr. Jamal to buy it from Mr. Samji or directly, putting up $1,000.00 as a deposit. Mr. Suleman was intending to pay Mr. Samji something because he had found the business opportunity. Mr. Suleman confirmed that he, Mr. Jamal, Mr. Samji and Mr. Lee, went to an Eva Road site to meet Mr. Scott but were then told to go to a Mississauga site to meet him, but when they got there he could

not meet with Mr. Scott. It became obvious to Mr. Suleman that Mr. Scott was not interested in meeting him and "didn't give us the opportunity" and "we were just given the run around" with no reason. (Transcript, Vol. V. pp. 22-24). Mr. Suleman testified that he had the money to complete the purchase, and that he lost another opportunity while he was trying to complete the purchase of the Widdicombe Place tuck shop business. Mr. Suleman has been operating a tuck shop business successfully in a high rise apartment since November, 1981. It was obvious from seeing him as a witness, that Mr. Suleman is a capable and serious businessman and that anyone honestly assessing him on the merits would consider him favourably as the operator of a tuck shop business. Mr. Suleman's evidence also tended to confirm Mr. Lee's testimony.

Mr. Lee waited two weeks, with Mr. Samji and the agent calling repeatedly to inquire as to whether the transaction would close, but testified that when he called Mr. Scott he was told that Mr. Scott would only consent if the sale was to Korean purchasers and a $5,000.00 assignment fee was paid. (Transcript, Vol. II, p. 109).

Mr. and Mrs. Lee testified that Mr. Samji was a nice, pleasant person, who had an existing dry cleaning plant business. They testified that a lady identified as "Christine", apparently an employee of West End and the manager on site at 53 Widdicombe, interviewed Mr. Samji, and had him complete an "application form" later telling Mr. Lee that she had reported to Mr. Scott that Mr. Samji was "nice" and that she did not know why Mr. Scott had turned Mr. Samji down.

Mr. Scott testified that the reference in the Samji Offer (Exhibit # 31) to "AND/OR HIS NOMINEE" created a problem in West End's mind as the corporation wanted an owner/operator of the tuck shop business. However, Mr. Scott refused to meet with either Mr. Samji or Mr. Suleman as the prospective purchaser or to even look seriously into this question. At no time did Mr. Scott inquire about Mr. Samji or Mr. Suleman's financial capacity. Mr. Scott could only suggest in cross-examination that "there was still some question in our minds about as to the relationship between Mr. Samji and Mr. Suleman," (Transcript, Vol. VII, p. 189) but admitted that he made no effort to answer his supposed question. (Transcript, Vol. VII, pp. 187, 194).

Mr. Scott had agreed to the assignment of the Khang lease for reasons he could not recall even though the Khangs had been there for a shorter period of time than the Lees, but Mr. Scott's asserted reason for not considering an assignment by the Lees to Mr. Samji or Mr. Suleman was that the Lees had not been tenants for any significant length of time. Mr. Scott's vague asscertions and attempted rationalizations of his actions during his testimony made no sense and were not credible.

Mr. Scott asserted also that he felt the Sulemans had limited experience with stores in Canada, and was concerned about whether Mr. Samji was still involved, although he did not explain why he had this concern or what difference that meant. It should not have mattered if Mr. Samji was assisting Mr. Suleman financially, although on the evidence it was clear in any event (from Mr. Suleman's evidence) that the Sulemans were putting up their own money. It is to be noted that a deposit of $1,000.00 was made, and that $11,800.00 was to be paid in cash on closing. Mr. Scott was very evasive in answering questions during cross-examination as to why the Sulemans, or Mr. Samji, were not acceptable. He really had no reason for refusing to even consider them. I have no doubt in finding that Mr. Scott's sole reason for refusing to consider an assignment of the lease to the Sulemans, or to Mr. Samji, was because they were of East Indian racial origin.

Mr. Lee discussed the matter with his lawyer, who advised him to go to the Ontario Human Rights Commission, which Mr. Lee did and his Complaint was signed March 14, 1979. (Exhibit # 32).

I found Mr. and Mrs. Lee to be truthful witnesses. They were entirely straightforward and honest in their testimony. I also found Mr. Jamal, Mr. Suleman, and Mr. Gonet, whose evidence supported the Lees, to be truthful in their testimony. Where the evidence of the Lees is in conflict with that of Mr. Scott, I accept their evidence and reject that of Mr. Scott. It was obvious in observing Mr. Scott as a witness that he was quite prepared to say anything at all in an attempt to defend himself. He was not a credible witness.

As noted above, Mr. Lee's Complaint was signed March 23, 1979 but the Lees continued to operate the store until the end of April, 1979. By that point, Mrs. Lee had headaches and the anxiety and depresion caused by the Lees' plight had resulted in her not being able to work any more. Mr. Lee took his vacation from his employment and operated the store for a week and then, when he returned to his employment, continued to operate the tuck shop simply in the evenings. Mr. Scott's approach at this point was to recite the provisions of the lease, as to the store having to be open 86 hours a week, and the rent being $500.00 per month (Exhibit # 38), the rent then being in arrears by $1,300.00. Apparently Mr. Lee did make a payment of part of the arrears after a letter demanding payment. (Exhibit # 38). Mr. Scott knew Mr. Lee wanted to sell, and Mr. Lee had told Mr. Scott he would pay the rent arrears from the sale proceeds. Mr. Scott also knew about Mr. Lee's Complaint. Mr. Gonet confirmed in his testimony that Mr. and Mrs. Lee could not carry on, mentally or physically, and matters just went downhill after the abortive sale.

On May 23, 1979, Mr. Lee found the store locked and contacted his lawyer. On June 6, 1979, a newspaper advertisement (Exhibit # 34) indicated the merchandise was to be sold, and the next day Mr. Lee found the store locked and empty. Mr. Scott called Mr. Lee June 26th to discuss the equipment still in the store and asked Mr. Lee if he would reopen or sell to someone else. Mr. Lee said he did not want anything further to do with Mr. Scott. Mr. Scott mentioned that someone was interested in the store, and this man phoned Mr. Lee later in the day to offer $7,000.00 for the equipment. However, Mr. Lee found someone himself, Mr. Pung Jak Yoon, who was interested in buying the business, and prepared to pay $7,500.00 for the equipment alone. Mr. Yoon went to see Mr. Scott but, Mr. Lee testified, returned to say that Mr. Scott would not agree to him as a purchaser. (Transcript, Vol. II, pp. 129-131). In late July, Mr. Lee got an agent, Chun Buing Ho, interested in helping him but says that the agent lost interest. About July 31, 1979, a bailiff contacted Mr. Lee to say that the equipment was to be sold.

Mr. Lee spoke with his accountant, Mr. Ashoa Verma, who had a friend, a Mr. Manji, who was prepared to offer Mr. Lee $13,500.00. Mr. Lee says that Mr. Manji went to see Mr. Scott, and then advised Mr. Lee that Mr. Scott wanted to see Mr. Lee. (Transcript, Vol. II, pp. 134, 135). Mr. Lee then went to see Mr. Scott who, Mr. Lee testified, advised Mr. Lee that if he wanted the sale to Mr. Manji to be completed that Mr. Lee had better "drop the case" before the Human Rights Commission. (Transcript, Vol. II, pp. 135, 136). Mr. Lee refused to do so. He told Mr. Scott that he had come to Canada with only $20.00 in his pocket, had worked sixteen hours a day, only to be treated in the manner he had been by Mr. Scott, and even though he might go broke, he was going to stand up to Mr. Scott on behalf of himself and other "small people". Mr. Lee told Mr. Scott "I'll take you anywhere in the world, any Court, and I will fight with you." (Transcript, Vol. II, pp. 135, 136). I have no doubt in finding on the evidence that Mr. Scott told Mr. Lee that he would have to drop his complaint with the Human Rights Commission before Mr. Scott would consent to any assignment of the lease.

The contemplated purchase by Mr. Manji from Mr. Lee was not proceeded with. It is clear from the evidence that Mr. Scott was putting pressure upon Mr. Lee after Mr. Scott learned of the Complaint, by closing the store and preventing Mr. Lee from selling the business, unless Mr. Lee dropped his Complaint. Incredibly, Mr. Scott asserted in his testimony that it was Mr. Lee who was trying to threaten him, with the Complaint. (Transcript, Vol. VI, p. 98).

Mr. Lee suffered extreme anxiety depression and general mental suffering as a result of his treatment at the hands of Mr. Scott. He testified that at one point he had

to call the Canadian Mental Health Association because he could not "keep going this way another couple of days" as he felt suicidal. He was in a probation period with his then employer, Bell Canada, and this employment was placed in serious jeopardy because of his anxiety and depresssion through his preoccupation with the problems arising in his tuck shop business. This was confirmed by Bruce Hutchinson, a fellow employee of Mr. Lee at Bell Canada. The suffering of the Lees at the hands of Mr. Scott was also confirmed by the testimony of their solicitor, Mr. Gonet.

Gradually, Mr. Lee felt better as time passed and he concentrated on his employment with Bell, with renewed success, and he was quite successful in this regard as of the date of the hearing.

Respondents argued that Mr. Jivraj's offer (Exhibit # 7) to Mr. Tabar was far too high a price at $27,000.00, and similarly, Mr. Samji's offer (Exhibit # 31) at $22,800.00 to Mr. Lee was too high, and therefore, the purchasers must be unsophisticated and would not be successful businessmen. However, all the evidence suggested that both Mr. Jivraj and Mr. Samji were experienced, reliable, and would be successful. The purchase price was irrelevant to the reasons for Mr. Scott refusing to consider them as purchasers/tenants on their merits. Moreover, they were free, willing buyers in the marketplace who placed a value on what they wanted to purchase. There is some irony in Mr. Scott questioning this, when his approach was to demand a $5,000.00 assignment fee of the purchase price from a vendor, which he could exact only because of the market power of the landlord through the inclusion of the consent provision in the lease which he could then use to bludgeon tenants throughout the term of the lease.

In his own evidence, given before Mr. Manji testified, Mr. Scott suggested that Mr. Manji was better at running the tuck shop business than Mr. Lee, saying that Mr. Manji had higher sales. It is true that initially, Mr. Manji's sales were greater, but his costs were also correspondingly greater, and his sales have declined each year from his initial year, to the point for his 1983 fiscal year his sales are below those of Mr. Lee for Mr. Lee's 1978 fiscal year. (Exhibit # 76). When one considers the bottom line profit margin, and adjusts it for the differences in management salaries, bank interest charges, and differential in rents paid, as between the two proprietors, there does not seem to be a significant difference in their performance as proprietors.

Mr. Scott asserted that the Lees did not keep the store clean, but there was no other evidence on this, and even if it were the situation, it would tend to be inconsistent with Mr. Scott's assertion that West End did not want a new tenant. Mr. and Mrs. Lee testified that Mr. Scott never complained about the way they operated the business until

they tried to sell it. All of the evidence indicates clearly that the Lees were successful in operating the business and were very well liked by the tenants.

Mr. Scott had no meaningful explanation as to why he would demand a $5,000.00 assignment fee from the Lees. He suggested at one point that it was a figure determined by his father-in-law and the corporation's legal counsel. (Transcript, Vol. VII, p. 112). The Lees had paid the Khangs $19,000.00 to buy the business (Exhibit # 29) in mid-1977 and Mr. Samji and Mr. Suleman were offering $22,800.00 in February 1979. (Exhibit # 31).

Mr. Gonet later learned that the locks were changed at the tuck shop and that there was a bailiff's sale. He tried unsuccessfully to reach Mr. Scott by phone and wrote to Mr. Scott May 28, 1979 (Exhibit # 48) with no reply. The proceeds of the bailiff's sale, $1,259.93, were applied against the outstanding rent, leaving some outstanding rent still owing.

After the store had been closed Mr. Ashoa K. Verma, Mr. Lee's accountant, introduced Mr. Sadrudin Manji to Mr. Lee, Mr. Manji being interested in buying a tuck shop business, and an Offer of $13,500.00 was submitted July 31, 1979. (Exhibit # 70).

Mr. Manji had experience in the wholesale food business, and in a gas station business, in Tanzania. He came to Canada in September 1972, was trained as a mechanic, and then operated a dump truck for some five years. In 1977 he bought a tuck shop business in an apartment building in East York which he and his wife sold in 1979. Mr. Verma, his accountant, mentioned in mid-July, 1979, that the Widdicombe tuck shop was available, and Mr. Manji was anxious to obtain another tuck shop business. He relied on Mr. Verma, without seeing the store himself, in making his offer.

Mr. Manji said Mr. Lee telephoned Mr. Scott in the presence of Mr. Manji and Mr. Verma, asking to meet with Mr. Scott. Mr. Manji said that Mr. Lee was abusive to Mr. Scott on the phone, and "then there was no further communication between the two people." (Transcript, Vol. VIII, p. 36). However, in my view Mr. Manji's evidence was coloured by the fact that West End is his present landlord and employer. Where there is any conflict in their evidence, I prefer the evidence of Mr. Lee to that of Mr. Manji. It was not Mr. Lee, but rather it was Mr. Scott, who was causing the difficulties. I accept Mr. Lee's evidence that Mr. Scott told him he would not consent to an assignment to Mr. Manji unless Mr. Lee dropped his Complaint. Mr. Gonet testified that Mr. Lee told him at the time that Mr. Scott had said to Mr. Lee that he wanted the Complaint dropped. (Transcript, Vol. III, p. 133).

It is remarkable that with the tuck shop now closed, that Mr. Scott would not be interested in pursuing the prospective purchaser, Mr. Manji, through Mr. Lee. Mr. Lee had no reason to want to do anything to abort what was quite probably his last opportunity at finding a purchaser. Mr. Lee had already filed his Complaint by this point of time. Mr. Lee testified that Mr. Scott demanded that Mr. Lee drop the Complaint, if Mr. Lee wanted Mr. Scott to consider assigning the lease. This was the reason for the breakdown in Mr. Lee dealing with Mr. Scott in respect of the proposed purchase by Mr. Manji.

Mr. Manji, realizing at that point in time that he could possibly deal with Mr. Scott directly, obtained a reference the next day, August 1, 1979, from his banker, and determining that Mr. Lee was not going to be able to get a consent to an assignment, approached Mr. Scott himself the next day as a prospective tenant.

Mr. Manji could see at this point that he could by-pass the tenant, Mr. Lee, and deal directly with the landlord, to his own advantage. Mr. Manji knew that the store was closed and knew that Mr. Scott wanted a new operator of the truck shop, and might also surmise that, due to the Complaint of Mr. Lee, Mr. Scott might well be anxious to now consider an East Indian operator of the tuck shop. He testified that Mr. Scott interviewed him and his wife and readily agreed to them being operators of the tuck shop. Mr. Manji was prepared to offer Mr. Lee, $13,500.00 July 31, including $8,000.00 for the equipment and $5,500.00 for goodwill. However, when he was able to deal with Mr. Scott directly, he did not have to purchase the business, but only the equipment which he paid $4,500.00 for, plus a payment of about $900.00 owing to Coca Cola for one item.

Mr. Scott was quite prepared to see Mr. Manji as a prospective tenant in early August, 1979, and Mr. and Mrs. Manji became and remain tenants at present in respect of the tuck shop business at Widdicombe. Mr. Manji and his wife are of East Indian racial origin. Accordingly, Respondents assert that they do not discriminate against East Indians, as evidenced by Mr. and Mrs. Manji being their tenants.

Mr. Manji was on the premises form August to December, and made a substantial investment in inventory, without any executed lease. He said he was prepared to take the risk that his running of the tuck shop would meet with Mr. Scott's approval.

Mr. Manji testified that his business started dropping off after a while, so that at one point in 1980 or 1981, he was unable to pay the rent for a couple of months, but said that Mr. Scott told him not to worry about it. However, the business continued to

decline, and he renegotiated the rent to $250.00 per month, and then when the business continued to fail he agreed to pay $175.00 per month for the utilities formerly included in the rent, and also was able to get an additional job as one of the doormen at the apartment complex, (with his wife operating the store while he is working as doorman), but at the time of the hearing he said he had not even been able to pay the $175.00 per month rent for the last couple of months because business was so bad. (Transcript, Vol. VIII, pp. 97, 98, 105, 106). Mr. Manji testified that Mr. Scott was being fair and proper in dealing with Mr. Manji as an on-going tenant of West End. Respondents assert that this also establishes that they do not discriminate against East Indians. However, it is quite clear from all the evidence that Mr. Scott's treatment of Mr. Manji did not at all accord with his real views toward East Indians as possible tuck shop operators. I find on the evidence that Mr. Scott, faced with Mr. Lee's Complaint and the certain knowledge that Mr. Lee was going to pursue it, quickly adopted, as an expedient opportunity in the circumstances, Mr. Manji as a tenant when Mr. Manji approached him. Mr. Scott saw Mr. Manji as offering a plausible defence to the accusations that were being made against him by Mr. Lee.

I have no doubt in considering all the evidence that prior to Mr. Manji, Mr. Scott rejected Mr. Samji and the Sulemans as prospective purchasers (just as he had rejected others, in particular the Jivrajs and Mr. Andani, before them) simply because they were of East Indian racial origin.

Complainants made much in their Complaints and arguments about the $5,000.00 assignment fee demanded of, and paid by, Mr. Tabar, and demanded of Mr. Lee. It would seem that such action of demanding an assignment fee, in itself, was lawful on the part of West End, but even it if was not, it would be a civil wrong to be dealt with as a civil action before a court, and not by this tribunal. I have no doubt, having seen Mr. Scott as a witness, that he would do whatever he thinks he can get away with, in his business relationships. He impressed me as someone who would abuse a position of power with complete indifference as to the consequences for others and their feelings, if it would advance his own self-interest. The entire course of his dealings with Mr. Tabar and the Lees bears out this evaluation. However, Mr. Scott's behaviour in respect of the assignment fees demanded in instances where he was prepared to consent to assignments, is irrelevant to the separate issue as to whether he breached the Code in rejecting the prospective purchasers of Mr. Tabar and Mr. Lee, and refusing consent to assignments of the lease. Moreover, the fact that Mr. Scott's character in this regard leaves a great deal to be desired is also irrelevant in determining the issues before this tribunal. The

charging of assignment fees, in itself, was not done on a basis that evidenced discrimination upon a prohibited ground.

The sole issue before this Board is whether the Respondents breached paragraphs 3(1)(a) and/or (b) of the Code. I have no doubt in finding, as I have already stated, that the sole operative reason on the part of Mr. Scott for the rejection of the Jivrajs and of Mr. Andani as purchasers for the tuck shop business from Mr. Tabar, and the later rejection of Mr. Samji and the Sulemans as purchasers from the Lees, was because of the race, colour, ancestry and place of origin of the intended purchasers in each instance. Mr. Scott, and West End, did not want East Indians as owners/operators of the tuck shop business, and this was the reason that Mr. Tabar, and later the Lees, were not able to sell their business to such intended purchasers and obtain consents to assignment of the lease.

THE LAW AND ITS APPLICATION TO THE EVIDENCE.

The following two related issues, inter alia, were reviewed in an Interim Decision of August 13, 1982, by this Board (see (1982) 3 C.H.R.R., D/1073), but it is appropriate to deal with them again here.

Each Complaint reads that it is brought in respect of "Self and class of persons distinguishable by race, colour, nationality, ancestry and place of origin." (Exhibits # 6 and 36).

(1) Class Action.

The Complaints were brought in respect of a "...class of persons distinguishable by race, colour, nationality, and place of origin." Can a Complaint be initiated in respect of such a group, and if it can be, can it be initiated by an individual or must it be initiated by the Ontario Human Rights Commission?

Under the Interpretation Act, R.S.O. 1980, c. 219, s. 27(j), in interpreting a statute, unless the contrary intention appears, the singular includes the plural. Thus, the word "person" in section 15 of the Code clearly embraces persons.

Subsection, 15(1) and (2) provide:

> 15.—(1) Any person who has reasonable grounds for believing that any person has contravened a provision of this Act may file with the Commission a complaint in the form prescribed by the Commission.
>
> (2) Where a complaint is made by a person other than the person whom it is alleged was dealt with contrary to the provisions of this Act, the Commission may refuse to file the complaint unless the person alleged to be offended against consents thereto.

Subsection 15(3) of the Code then refers to "group of persons."

> (3) Where the Commission has reason for believing that any person has contravened a provision of sections 1 to 5 in respect of a person or group of persons, the Commission may initiate a complaint.

These subsections allow an individual "who has reasonable grounds" to initiate a complaint, even though he is alleging it was another person discriminated against,

although in such instance (by subsection 15(2)) the Commission may refuse to file the complaint "unless the person alleged to be offended against consents thereto."

Moreover, it seems clear that subsection 15(1) and (2) allow an individual to bring a complaint on behalf of more than one person, even a "class of persons", as do the Lee and Tabar Complaints, although it is only subsection 15(3) that refers expressly to a complaint "in respect of a...group of persons." The intent of subsection (3), in my opinion, is simply to give the Commission itself the power to initiate a complaint.

Section 3, under which these Complaints were laid, expressly prohibits discrimination against a class of persons.

> 3. (1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
>
> (a) deny to any person or class of persons occupancy of any commercial unit...; or
>
> (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit...;
>
> because of race...colour...nationality...or place of origin of such person or class of persons or of any other person or class of persons. (emphasis added).

This provision clearly implies that a complaint may be laid on behalf of a class of persons, supporting the interpretation given above in respect of section 15.

In a Nova Scotia case, Hamid Rosheed, Executive Director of The Black United Front of N.S. v. Barry Bramhill ((1981), 2 C.H.R.R. D/249 (N.S. — Charles) a complaint was laid on behalf of an undefined class of blacks with respect to buttons containing a phrase that referred to blacks in a derogatory manner. It decided for the Complainant and ordered the buttons destroyed.

However, there is case law in some provinces which suggests that class actions cannot be brought. Many boards in Canada have required that the class allegedly discriminated against be clearly defined. In Michael Huck v. Canadian Odeon Theatres Ltd., ((1981), 2 C.H.R.R. D/351 (Sask. — Bekolay)) the Complainant alleged that he had been denied access to the Respondent's cinema because he was in a wheelchair. He initially filed the complaint on behalf of all handicapped persons in wheelchairs. The board cited a provision, section 30, in the Saskatchewan Human Rights Code (S.S. 1979, C. s-24. 1) which is identical to section 18(1) of the Ontario Code, that lists the parties

to a proceeding before a board of inquiry, but does not include a class of persons or a representative of such a class. The Saskatchewan board held that the list is exhaustive and does not allow a class action to be brought unless each individual member of the class is named as a Complainant. The Board held that the Saskatchewan Human Rights Commission could protect the rights of a class of persons where the members are not named. (at D/352). With respect, it seems to me that as the Commission is always made a party by statute (paragraph 18(1)(a) of the Ontario Code) and as the person named in the complaint as complainant is also a party (paragraph 18(1)(b)), as are Mr. Tabar and Mr. Lee in the instant situation, then such complaint can be brought on behalf of a class even though the specific members of the class cannot be named. This seems the only way to give effect to what seems intended by the legislature through subsections 15(2) and 3(1) of the Ontario Code.

In Levesque and Tardif v. The Daily Gleaner (September 10, 1974, (N.B. — Webster)) complaints were laid on behalf of all French Canadians with respect to two letters containing derogatory remarks about French Canadians that were published in the Respondent newspaper. The board discussed the definition given to the word "person" in the New Brunswick Human Rights Act (R.S.N.B. 1973, c. H-11, as amended) and held that it narrowed the definition of "class of persons". The New Brunswick Act definition of "person" in section 2, which is identical to the definition in the Ontario Code (s. 26(i)) reads thus:

> "person", in addition to the extended meaning given it by the Interpretation Act, includes an employment agency, an employers' organization and a trade union;

The New Brunswick Interpretation Act defined "person" in section 38 to include corporations, partnerships and legal representatives. 9R.S.N.B. 1973, c. I-13). The board in Levesque set out these two definitions of "person" and said:

> The Human Rights Act by defining the word "person" in this way does not provide the machinery to deal with a complaint by one or two people on behalf of a large group of people with the same ethnic background.

The Board held that, for this reason, it did not have jurisdiction to make orders against the Respondent. However, the New Brunswick Interpreation Act, in paragraph 22(h), says that a word in the singular includes the plural. Moreover, Levesque seems distinguishable on several bases.

The Ontario Code seeks to protect all persons and classes of persons from discrimination on prohibited grounds. Section 3 expressly prohibits discrimination against "any person or class of persons". If there is no means by which a class of persons may enforce their rights, as a class, such rights would be rendered nugatory. Where there is a right there must be a remedy. Moreover, it seems clear that the legislature must be saying that society has an interest in protecting the basic human rights of a class of persons, and thus a person may bring a complaint on behalf of the class: sub-sections 15(2) and 3(1).

The Board in Huck, supra, answered this concern by saying that under the Sasktachewan Code, the Commission itself could bring a complaint on behalf of a class, the members of which are not named. While this is true, and the Commission always has "the carriage of the complaint" (paragraph 18(1)(a) of the Ontario Code) it is not necessary, in my view, that the Commission be the named complainant. If this were necessary, it would seem that subsection 15(2) of the Ontario Code would be worded differently, and subsection 15(3) would make it mandatory for the Commission to initiate a complaint where the rights of a class of persons are infringed.

The Sastatchewan Human Rights Commission recently successfully brought a Complaint made by itself against a student newspaper on the basis that the publication discriminated against "women in the Province of Saskatchewan" as a class because of their sex. Saskatchewan Human Rights Commission v. Brent Waldo et al and The Engineering Students' Society, University of Saskatchewan, (1984) 5 C.H.R.R. D/2074 at D/2077, D/2094, D/2095. In my opinion, such a complaint could have been initiated in Ontario by an individual in respect of women as a class, given subsections 15(1) and (2) of the Code.

As "person" is defined in the Ontario Code to "include" certain defined groups such as corporations and unincorporated associations, the legislature could not have intended to limit "class of persons" to just the named types of groups. In the context of the Code the types of classes referred to are those composed of persons having a characteristic in common which is a prohibited ground for discrimination. For example, section 3 of the Code prohibits discrimination against "any person or class of persons" with respect to rental of any commercial units or housing accommodation "because of race...colour...nationality...or place of origin of such person or class of persons or of any other person or class of persons." The class of persons the Code is referring to could only be a class of persons defined by their common race, colour, nationality or place of origin.

Subsections 15(1) and (2) of the Ontario Code are broad enough to permit a complaint to be filed on behalf of a class of persons. The provision in the New Brunswick Act under which Levesque was decided is narrower than section 15 of the Ontario Code. In New Brunswick a person could only file a complaint if he personally claimed "to be aggrieved because of an alleged violation of this Act." (R.S.N.B. c. H-11, s. 17) Under subsection 15(1) of the Ontario Code any person may file a complaint if he believes that the Code has been violated. He need not be personally aggrieved. Subsection 15(3) of the Ontario Code permits the Commission to initiate a complaint where it has reason for believing that any person has contravened the Code in respect of "a person or group of persons". Thus, clearly the Commission may initiate a complaint on behalf of a class of persons. Subsection 15(2) represents an intermediate position, allowing a complaint to be brought by someone other than the person discriminated against, but in such a situation the Commission may insist that the person discriminated against consents to the making of the Complaint.

Paragraph 18(1)(a) provides that the Commission shall be a party to the proceedings and that it shall have carriage of the complaint. Paragraph 18(1)(b) provides that the person named in the complaint as the complainant shall be a party to the proceedings before the board of inquiry. Paragraph 18(1)(c) provides that "any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act" shall be a party to the proceedings. As there is a separate provision making aggrieved persons parties to the proceedings in paragraph (c), a requirement that the complainant be personally aggrieved cannot be read into paragraph (b).

In my opinion, complaints can be filed on behalf of a class of persons under the Ontario Human Rights Code, without the members of the class being named, as has been done in the instant situations by the Complainants.

Indeed, an earlier Saskatchewan case lends support to this view. In Singer v. Pennywise Foods Ltd. (November 5, 1976, (Sask. —Taylor); certiorari granted October 5, 1977 (Sask. Q.B.); reversed on appeal, May 29, 1978 (Sask. C.A.), the complaint concerned a publicly displayed sign featuring a "black sambo" caricature. The Saskatchewan Human Rights Commission Act (S.S. 1972, c. S-25, s. 9) required the Commission to inquire into any person's complaint of an infringement of a right, and the board held that this provision was broad enough to permit the caucasian Complainant in that case to file his complaint. The Respondent applied for certiorari on the grounds that, as the complainant was not directly affected in the sense of being personally discriminated against, he did not enjoy a right to make a complaint to the Commission. The Court of

Queen's Bench for Saskatchewan denied certiorari, saying that the words "any person" in the Act meant what they said and, therefore, included this Complainant. The Court of Appeal agreed on this point.

In my opinion, the Respondents discriminated against East Indians as a class of persons (at least until Mr. Manji became their tenant in early August, 1979), with respect to the occupancy of West End's tuck shop, contrary to paragraph 3(1)(a) of the Code. It is not necessary to consider a remedy in respect of this finding, given that the complainants brought a complaint on behalf of themselves as individuals, which will now be considered, as it raises a further issue.

(2) Complainants not the persons directly discriminated against because of their own race, nationality, ancestry and/or place of origin.

The allegations of discrimination against East Indians contained in the Lee and Tabar Complaints having been substantiated, can Mr. Lee and Mr. Tabar be successful in complaining of discrimination in respect of themselves as individuals? Because of the Respondents' discriminating against third parties (those individuals seeking to purchase the business of the Complainants and obtain an assignment of lease in connection with such purchases), the Complainants suffered injury. As they could not sell their businesses, given the refusal of the Respondents to consent to the assignment of lease, the Complainants had significant losses. Can they, then, as individuals, succeed on this basis in obtaining compensation under the Code?

Mr. Tabar is a Christian Arab from Israel. Mr. Lee is of Korean ancestry. Given the discrimination of the Respondents toward persons (prospective purchasers for their businesses) of a visible minority (East Indian) on a race, colour and place of origin basis, the Complainants each found such racially discriminatory remarks insulting and offensive from a personal standpoint, but by far the main pecuniary impact from the Complainants' standpoint was the consequential economic loss through losing prospective purchasers.

Having found that Mr. Lee and Mr. Tabar were not personally discriminated against by the Respondents because of their own race, nationality, ancestry and/or place of origin, but rather their prospective purchasers were, on such prohibited grounds, is there a breach of the Code by the Respondents vis-a-vis the Complainants themselves, and does this board have the power to order compensation of Mr. Lee and Mr. Tabar for the losses they suffered as individuals because of the discrimination in respect of third parties?

In Jahn v. Johnstone (September 16, 1977 (Ont. — Eberts) a landlord had been found to have discriminated against the Complainant's black dinner guest, requiring that he immediately leave the property and threatening that the Complainant would have to move out if her guest did not leave. The landlord gave the Complainant a month's notice to quit on the grounds that she had "disgraced" the property by bringing a black man onto it. The board found that paragraph 3(1)(b) was broad enough to order the landlord to compensate the Complainant even though she had not been the one discriminated against in the first instance. This provision reads:

> 3. -(1) No person...shall,
>
> (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any housing accommodation, because of race,...nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons. (emphasis added)

The board said:

> To deal with the second element of the section, one asks whether the discrimination against Ms. Jahn arose because of "the race...of any other person or class of persons." The connection between the visit of Keith McGhie and the events of August 7 is, on the evidence, clear and unmistakeable. There is apparently no limitation in the section of the range of "any other persons" who can attract to a complainant punishable discrimination. The section is not limited to redressing discrimination against a tenant or would-be tenant because of the characteristics of his or her closest associates: spouses, lovers, children. It is framed so broadly that a tenant or would-be tenant is protected against discrimination arising from the landlord's attitude toward third parties completely unknown to the tenant, as for example where the landlord rejects a (prospective) tenant because he or she is not the same race or nationality as all the other tenants presently in the building.
>
> ...
>
> Section 3(1)(b) recognizes that there are other factors besides the characteristics of the tenant or would-be tenant which might result in discriminatory treatment and seeks to broaden the tenant's protection against discrimination for those causes. Secondly, the section aims at preventing the punishment by private parties - in this case, landlords - of those who in their own lives adhere, without fanfare, to the ideals espoused in the Code. Tradespeople who deal

> evenhandedly with customers, suppliers, and employees, of whatever race, religion, nationality or sex; and householders who extend the warmth of family ties or of hospitality to people of different origins should not be deterred from doing so by the intervention of those to whom they look for security of tenure. (emphasis added) (Id, at 17-18).

The reasoning in Jahn has been approved in a more recent board of inquiry decison Marion MacAdam v. Mr. and Mrs. H. M. Meadows (1982) 3 C.H.R.R. D/704 at D/708, D/709 (Ont. -Zemans).

In the instant case, Mr. Lee and Mr. Tabar were being injured and punished by West End and Mr. Scott in seeking to deal with prospective purchasers in compliance with the law, that is, by dealing fairly with purchasers of different racial origins.

The English Employment Appeal Tribunal in Zarczynska v. Levy ((1979) 1A11 E.R. 814) dealt with an analogous situation. An employer instructed his barmaids not to serve coloured people. An employee barmaid disagreed and her employment was terminated. Applying a purposive construction to the Race Relations Act 1976, the appeal tribunal allowed the barmaid's appeal claiming compensation for herself as a complainant who had been personally injured, since she, on racial grounds, had been treated as an employee less favourably than barmaids who obeyed the unlawful instruction of the employer.

The board in Jahn found that by not allowing the tenant to invite black persons into her home, the landlord interfered with her covenant of quiet enjoyment. The board said:

> This contraction of her right to quiet enjoyment of the premises from one which is to be available for "all usual purposes" to one which would be available "for all usual purposes except the offering of hospitality to blacks" is a discrimination or differentiation in a term or condition of occupancy which operates against Ms. Jahn. She is thereby put in a worse position than other tenants who enjoy the covenant of quiet enjoyment to its full extent; it is immaterial that these "other" tenants are not tenants of Mr. Johnstone, but tenants in Ontario generally. (Id, at 16).

Similarly, Mr. Lee's and Mr. Tabar's rights to assign their commercial leasehold interests were restricted by their landlord on a ground prohibited by the Code, placing them in a worse position than other commercial tenants in Ontario. They were personally discriminated against with respect to a term or condition of occupancy. The Respondents cannot take refuge in the clause in the lease which allows them to arbitrarily refuse to consent to an assignment or sub-let. The lease, and decisions made

by West End in respect of its rights by the lease, must conform to the requirements of the Code. Paragraph 3(1) (b) makes it unlawful for the landlord to refuse such consent if the operative ground for such refusal is a prohibited ground under the Code. In the instant situation, it was the sole operative ground for the refusal to consent to an assignment.

In Jahn, the remedy included requiring the landlord to compensate the Complainant for moving expenses and the rent differential between her new apartment and the one she rented from Mr. Johnstone. He was also required to pay her $200.00 to compensate her for her loss of dignity resulting from her embarrassment at having to ask her black guest to leave. Because of the breach of paragraph 3(1)(b) in respect of them, as individuals, by the Respondents, the Complainants in the instant case should be fully compensated for their injuries, losses and expenses flowing from the landlord's discriminatory treatment of their prospective purchasers and for their own loss of dignity in being prohibited from selling on prohibited grounds. In the instant situation, the Complainants have been personally discriminated against in breach of paragraph 3(1) (b) of the Code, due to the discrimination by the Respondents against third parties, prospective purchasers, because of their being East Indian.

Even if there had not been discrimination directly against the Complainants within the meaning of paragraph 3(b), the mere fact of discrimination against East Indians, which had consequential injuries and losses to the Complainants would, in my opinion, render the Respondents liable for such injuries and losses under the Code.

Section 19 of the Code reads:

> 19. The board, after hearing a complaint,
>
> (a) shall decide whether or not any party has contravened this Act; and
>
> (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provisions and to rectify any injury caused to any person or to make compensation therefor. (emphasis added)

In my opinion, Mr. Lee and Mr. Tabar can be compensated for their losses arising from the discrimination against their prospective purchasers, even if they were not personally discriminated against because of their own race, colour, nationality, ancestry or place of origin, by reason of paragraph 19(b). However, in my opinion, paragraph 3(a)

goes further and expressly provide that when persons are discriminated against with respect to any term or condition of occupancy of a commercial unit (as the Complainants were here because they were denied the opportunity of assigning the lease to prospective purchasers who were East Indians), then the Complainants themselves are personally discriminated against by the Respondents within the meaning of paragraph 3(b) of the Code.

The complainants are protected by paragraph 3(1)(b) which says that no "person shall...discriminate against (them)...with respect to any term or condition of occupancy of (their)...commercial unit because of race,...colour,...or place of origin of any other person..." There is intentional discrimination against the Complainants personally by both Respondents by reason of the breach of paragraph 3(1)(b) of the Code. The discriminatory acts of the individual Respondent Scott were done by him as an officer and employee who is part of the directing mind or management of the Respondent West End, and such acts being done during the course of his employment, they are deemed to be the acts of West End and hence, the corporate Respondent is in breach of the Code as well.

(3) The Adding of Kyung S. Lee as a Complainant Party.

I made Kyung S. Lee, the spouse of the Complainant Chong Man Lee, a Complainant party on August 29, 1984, at the request of counsel for the Commission. The proceeding throughout had been on the basis that Mr. Lee was the owner of the tuck shop business, with his wife as an operator. Toward the conclusion of the evidence, the Lees' income tax returns were filed as exhibits (# 78, #79, #80 and #81), and with the financial statements included therein, it was brought home to Commission counsel that Mrs. Lee was more than a mere operator, and that she was a co-owner of the business, and a business partner of Mr. Lee on a 50-50 basis. Accordingly, counsel requested that Mrs. Lee be made a Complainant party for the purpose of the business loss being claimed. It should have been apparent to the Commission at the time of its investigation that Mrs. Lee was a co-owner of the business, particularly because the documentation indicated such (for example, Exhibit # 29). This oversight could be corrected up to the conclusion of the hearing, without any conceivable prejudice to the Respondents due to the delay in making Mrs. Lee a Complainant party. The Respondents, or at least their counsel, were well aware of the oversight, and in any event, the nature and amount of the business loss did not change with the addition of Mrs. Lee as a Complainant party. It seems a Board clearly has the power by section 18 to add a person as a party even at the

hearing. See Interim Decision, Tabar and Lee v. West End and Scott, (1982) 3 C.H.R.R. D/1073 at D/0177, D/1078. I had no hesitation in allowing Mrs. Lee to be added as an individual Complainant party with respect to the business loss. However, I did not add Mrs. Lee as a Complainant party with respect to any further claim, say for general damages, nor was I requested to. As Mrs. Lee had not been cross-examined as fully as she might have otherwise been in respect of such a possible claim, it would not have been fair to Respondents to allow her to be added as a party for this purpose at such a late point in time. Had she filed a formal Complaint and been a party from the inception, I would have made an award of general damages in her favour, as she also suffered grievously due to the unlawful discrimination of the Respondents.

(4) Constitutional Issue.

Respondents' counsel in argument briefly questioned whether the Code was constitutionally valid legislation in respect of the powers conferred upon a Board in Section 19 of the Code. In my view, the Code, including section 19 , is founded upon the constitutional powers conferred upon the province by section 92(13) and 92(16) of the Constitution Act, 1867. Quite clearly, neither the Code generally, nor section 19 in particular, can impinge upon the power conferred upon Parliament by section 96 of the Constitution Act, 1867 as to the appointment of judges.

I have reviewed the judgment of the Supreme Court of Canada Re: Residential Tenancies Act of Ontario, (1981) 37 N. R. 158 (S.C.C.) . In my opinion, the Ontario Human Rights Code and, in particular, section 19 thereof, meets the tests set forth by Dickson, J. (as he then was) in that decision, as being legislation within the legislative authority of Ontario. Given the history of the Code, the broad public policy objectives and the underlying central purpose of the Code, and the public interest to be met thereby, the powers given by section 19 of the Code are merely "an adjunct of, or ancillary to, a broader administrative or regulatory structure." (id at 170). The adjudicative function of the legislation can be characterized as merely incidental to the administrative features of the legislation.

(5) Damages.

I have reviewed the principles generally applicable in respect of damages in human rights cases in Rossana Torres v. Royalty Kitchenware Limited (1982) 3 C.H.R.R. D/858 and Rand et al v. Sealy Eastern Limited, Upholstery Division (1982) 3 C.H.R.R. D/938.

The Respondents' unlawful discrimination was the proximate and direct cause of the losses claimed by Mr. Tabar and the Lees.

Mr. Tabar testified that he felt Mr. Scott regarded him as "a slave" rather than as a person. Mr. Scott's unlawful discrimination caused Mr. Tabar considerable stress and mental anguish. Mr. Tabar was ill and therefore particularly vulnerable, but Mr. Scott was completely indifferent as to the consequences of his actions upon Mr. Tabar. Indeed, from my observation of Mr. Scott as a witness, I would say that he took satisfaction in being able to hurt Mr. Tabar, and the Lees, because of the position of power he held over them. I would assess Mr. Tabar's general damages for mental anguish at $1,000.00.

Mr. Tabar's pecuniary loss amounts to the difference in price for the sale of his business that he would have received if Mr. Scott had not unlawfully discriminated, and the price actually received. The Jivrajs offer was for $27,000.00; Mr. Tabar received a price of $18,000.00 from the Khangs on the eventual sale, for a difference of $9,000.00. I have ignored the $5,000.00 assignment fee, for the reasons I have given already.

Mr. Lee submitted a detailed claim as to his financial loss (Exhibit # 35), but this statement was not all that helpful. His major loss can be calculated as follows. The Samji and Suleman offer which did not result in a sale because of Mr. Scott's unlawful discrimination, was for $22,800.00. Mr. and Mrs. Lee recovered $4,100.00 from the sale of his equipment to Mr. Manji, and Mr. Manji assumed a liability to Coca Cola of about $900.00. Mr. and Mrs. Lee also lost their inventory, which he valued at $12,000.00 and his accountant, Mr. Verma, at about $10,000.00. The evidence was vague but this seems to be a retail price, and the mark-up was about 25 per cent. (See Exhibit # 31). I think a conservative figure should be put on the inventory, not because I think either Mr. Lee or Mr. Verma were trying to inflate the figure, but simply because the figure was somewhat of a guess. I would place the lost inventory at $7,500.00.

On this calculation, I would put the Lees net loss at $17,800.00 in respect of the abortive sale, plus $7,500.00 for inventory which he could have sold to the Sulemans, but was lost due to the abortive sale, for a total of $25,300.00. However, it is apparent that the Lees would have had to pay an assignment fee of $5,000.00 which, as I have said, while exhorbitant and unfair, seems lawful, as a contractual right, and in any event was

not in itself based on unlawful discrimination. Accordingly, I would put the Lees pecuniary loss at $20,300.00.

Mr. Lee suffered grieviously at the hands of Mr. Scott because of the latter's unlawful discrimination. Mr. Scott caused Mr. Lee a great deal of mental anguish, with adverse effect upon his family life and upon his employment with Bell, for a good length of time. I have no doubt that Mr. Lee was so despondent that he felt suicidal at one point. Both Mr. Gonet, his solicitor, and Mr. Hutchinson, his friend and fellow employee at Bell, confirmed the extreme anguish, stress and anxiety that Mr. Lee suffered as a result of Mr. Scott's unlawful discrimination. Mr. Scott was completely callous toward the Lees, and totally indifferent to the suffering he caused them. I would award Mr. Lee $3,500.00 for mental pain and suffering. Mrs. Lee suffered as well, and if she had been a complainant from the inception of the hearing, I would have made an award to her.

(6) Interest.

Respondents' counsel in argument questioned whether interest can be included as part of an award. It seems to me that interest can be awarded under paragraph 19(b) of the Code. See Olarte et al v. Commodore Business Machines Ltd., (1983) 4 C.H.R.R. D/1705 at D/1749; B.L. Mears et al v. Ontario Hydro et al, (1984) 5 C.H.R.R. D/1927 at D/1943.

In the instant situation, interest should run from the end of May 1981, by which time the Respondents knew that the Complainants had made claims on behalf of themselves as individuals. As for the rate of interest, it seems to me that the rate should be set at 13 per cent. The chartered banks' prime rate on business loans was 18.25 per cent in April, 1981, and 19.50 per cent in May, 1981, but the rate has fluctuated considerably since that time. Most certainly, the rate has averaged more than 13 per cent, but I think 13 per cent to be appropriate in all the circumstances. The interest runs for the period June, 1981 to the date of this Decision, inclusive, being three years and 120 days.

ORDER

This Board of Inquiry having found the Respondents to be in breach of paragraph 3(1)(a) of the Ontario Human Rights Code in respect of the Complaints by reason of discrimination against a class of persons distinguishable by race, colour, ancestry and place of origin, and in breach of paragraph 3(1)(b) of the Ontario Human Rights Code, in respect of all Complainants as individuals, for the reasons given, this Board of Inquiry orders the following:

1. The Respondents shall cease and desist in unlawful discrimination in respect of the rental and occupancy of commercial units they own or manage;

2 The Respondents are jointly and severally liable to pay forthwith to the Complainants, as follows:

a) to the Complainant Bahjat Tabar,

i) as damages for the loss arising in respect of the sale of his business, the sum of nine thousand ($9,000.00) dollars;

ii) as general damages, the sum of one thousand ($1,000.00); and

iii) as interest, the sum of four thousand three hundred and twenty-six ($4,326.00) dollars;

b) to the Complainants, Chong Man Lee and Kyung S. Lee,

i) as damages for the loss arising in respect of the sale of their business, the sum of twenty-thousand and three hundred ($20,300.00) dollars; and

ii) as interest, the sum of eight thousand seven hundred and eighty-four ($8,784.00) dollars;

c) to the Complainant, Chong Man Lee, as general damages,

i) the sum of thirty-five hundred ($3,500.00) dollars; and

ii) as interest, the sum of fifteen hundred and fourteen ($1,514.00) dollars.

Dated at Toronto this 29th day of September, 1984.

Peter A. Cumming
Board of Inquiry